

IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

Supreme Court, U. S.
ED

APR 13 1976

No. 75-552

MICHAEL RODAK, JR., CLERK

THOMAS S. KLEPPE, Secretary of the Interior, et al.,
Petitioners,
v.

SIERRA CLUB, et al.,
Respondents.

No. 75-561

AMERICAN ELECTRIC POWER SYSTEM, et al.,
Petitioners,
v.

SIERRA CLUB, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF
**THE COMMONWEALTH OF VIRGINIA, AND THE
CUMBERLAND PLATEAU PLANNING DISTRICT
COMMISSION AS AMICI CURIAE**

CUMBERLAND PLATEAU PLANNING
DISTRICT COMMISSION
RONALD J. WILSON
Attorney for the Commission
810 - 18th Street, N.W.
Washington, D.C. 20008

COMMONWEALTH OF VIRGINIA
ANDREW P. MILLER
Attorney General
ANTHONY F. TROY
Chief Deputy Attorney
General

JAMES E. RYAN, JR.
Deputy Attorney General

FREDERICK S. FISHER
Assistant Attorney General

J. THOMAS STEGER
Assistant Attorney General
Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219

TABLE OF CONTENTS

	Page
DESCRIPTION AND INTEREST OF AMICI CURIAE	2
ARGUMENT	4
I. A REGIONAL ENVIRONMENTAL STATEMENT IS NECESSARY TO ANALYZE THE SOCIAL AND ECONOMIC EFFECTS OF THE FULL NORTHERN GREAT PLAINS COAL PRODUCTION ON THE APPALACHIAN COAL REGION	4
II. THE COMAPARATIVE ENVIRONMENTAL EFFECTS OF WESTERN AND EASTERN COAL PRODUCTION CAN BEST BE CONSIDERED IN A REGIONAL ENVIRONMENTAL IMPACT STATEMENT	7
III. A REGIONAL ENVIRONMENTAL IMPACT STATEMENT IS NECESSARY TO ANALYZE THE RELATIVE COSTS OF EASTERN AND WESTERN COAL	9
CONCLUSION	12

TABLE OF CITATIONS

	Page
National Environmental Policy Act, Section 102 (2) (C), 42 U.S.C. 4332(2) (C)	4
Code of Virginia, Sections 2.1-63.5, 15.1-1403 <i>et seq.</i>	3
Greater Coal Utilization, Joint Hearings before the Senate Interior and Insular Affairs and Public Works Committees, 94th Cong., 2d Sess. (1975)..	10, 11
Sulfur Content of United States Coal, Bureau of Mines Information Circular 8312	2
Virginia Department of Labor and Industry Annual Report, 1974	6
Charles River Associates, Inc., The Economic Impact of Public Policy on the Appalachian Coal Industry and the Economy, prepared for the Appalachian Regional Commission, Washington, D.C., 1973	7

IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-552

THOMAS S. KLEPPE, Secretary of the Interior, et al.,
Petitioners,

v.

SIERRA CLUB, et al.,
Respondents.

No. 75-561

AMERICAN ELECTRIC POWER SYSTEM, et al.,
Petitioners,

v.

SIERRA CLUB, et al.,
*Respondents.*On Writs of Certiorari to the United States Court of Appeals
for the District of Columbia CircuitBRIEF OF
THE COMMONWEALTH OF VIRGINIA, AND THE CUMBERLAND PLATEAU PLANNING DISTRICT COMMISSION AS AMICI CURIAE

The Commonwealth of Virginia, and the Cumberland Plateau Planning District Commission (hereafter Cumberland) respectfully submit this brief as amici curiae for consideration by this Court. Virginia and Cumberland support the position of respondents Sierra Club, *et al.*, and urge the Court to affirm the decision of the United States Court of Appeals for the District of Columbia Circuit.

DESCRIPTION AND INTEREST OF AMICI CURIAE

Virginia is a major producer of eastern coal. The Appalachian States, including West Virginia and Virginia, account for approximately two-thirds of the Nation's coal production. Final Environmental Impact Statement, Proposed Federal Coal Leasing Program ("Coal Programmatic EIS"), United States Department of the Interior, p. 8-30. Eighty percent of the coal produced in Virginia is low in sulfur content, containing less than one percent sulfur. *Sulfur Content of United States Coal*. Bureau of Mines Information Circular 8312. A large portion of the coal produced by the Appalachian States is consumed by energy markets in the eastern and midwestern United States.

Virginia is concerned that the action of the Federal government in refusing to consider the overall nationwide impact of its coal-leasing activities will adversely affect vital economic and social aspects of their environment. In southwestern Virginia coal production has been the dominant industry for generations. For many reasons, particularly cheaper sources of energy from domestic natural gas and imported oil, the coal producing areas in the Appalachian States have been in a very depressed and impoverished condition for many years, and have been the object of considerable federal efforts

to improve their economic situation. The present national need for coal presents an opportunity for Appalachia to advance economically as a major source of the nation's coal. The development of huge federal reserves of coal in the west seriously threatens the economic foundation of Appalachia, and this should be carefully considered in any determination of the costs and benefits of such development.¹

The Cumberland Plateau Planning District Commission is an agency of local government created by the governments of Buchanan, Dickenson, Russell and Tazewell Counties in the southwest region of Virginia, pursuant to Virginia law. Code of Virginia, Sections 2.1-63.5 and 15.1-1403, *et seq.*, as amended. Its purpose is to assure the orderly future development of the area. Its staff engages in research and planning activities in order to advise local governments as to the future economic, social and environmental effects of their decisions. This work is financed by funds received from participating local governments and through grants received from Federal and State agencies. The Commission is a policy-making body whose members are local officials appointed by participating local governments.

The area served by the Cumberland Plateau Planning District Commission accounts for 80 percent of the coal produced in Virginia. The Commission is concerned that the Federal government's failure to consider the national implications of its coal leasing decisions will have adverse effects upon eastern coal producing areas and that these effects will be felt most immediately and most seriously at the local level.

¹ In addition, any curtailment in coal production will cause loss of coal traffic carried by the railroads of the Appalachian region. Coal represents the most important payload of these railroads and has contributed to their relative prosperity. Without it, they may suffer the fate of the northeastern railroads, to the great detriment of the national transportation network.

ARGUMENT

Virginia and the Cumberland Commission urge the Court to affirm the decision of the court below that Section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. 4332(2)(C), requires the Federal government to prepare a comprehensive environmental impact statement which will analyze the environmental effects of intensive coal development in the Northern Great Plains region and reasonable alternatives to that development. Since the legal arguments in support of this position are fully presented by respondents, amici will not repeat these contentions. Instead, we will show that substantial environmental issues of importance to us and other eastern States and localities have not been adequately considered in an environmental statement concerning western coal development and can only be adequately considered in an overall regional impact statement.

I

A REGIONAL ENVIRONMENTAL STATEMENT IS NECESSARY TO ANALYZE THE SOCIAL AND ECONOMIC EFFECTS OF THE FULL NORTHERN GREAT PLAINS COAL PRODUCTION ON THE APPALACHIAN COAL REGION

Until very recently, the Department of the Interior, which has responsibility for permitting the mining of coal on federal lands, has taken the position that the National Environmental Policy Act required no more than environmental statements for particular mining plans. Environmental statements were not even prepared when leases were issued. The Department seems now to have reconsidered its position. It has prepared an environmental statement for a group of four coal mines and a railroad line in the Eastern Powder River Coal Basin of Wyoming which it describes as a regional

impact statement and has declared that it will henceforth prepare such "regional" statements for groups of mines and related activities. In addition, it apparently will analyze individual actions which have significant effect on the environment. Nonetheless, it still refuses to acknowledge that the many federal actions intended to expand coal mining in the region are of such a scale and nature as to constitute a federal program. These actions, comprised of a multitude of decisions, will have an enormous effect on areas of historic coal production outside of the Northern Great Plains.

No environmental impact statement issued to date has attempted to deal in any way with the total effect which wholesale stripping of coal in the Northern Great Plains will have, either within its region or outside of it. The environmental impact statement on the entire federal coal leasing program might have provided a framework for an evaluation of the costs and benefits of producing coal in various areas of the nation, but it did not do so. Instead, that statement focused on areas containing substantial quantities of federal coal, which is not significant in Appalachia. In response to public comment that the statement did not compare eastern versus western coal development, the Department of the Interior added a one-page analysis of this issue which dismissed the potential effect on the eastern coal regions from western coal development with the offhand notation that cessation of federal leasing might help reverse the process of economic decay which presently plagues the Appalachian region (Coal Programmatic, p. 8-31):

Continued or expanded eastern coal production will have the effect of retaining established populations in Appalachian communities. Existing lifestyles will be perpetuated and current economic decay would perhaps be reversed.

We submit that the economic fate of one of the historically most depressed regions of the country requires more than one page to apprise the decision-maker adequately of the effect which accelerated leasing of western coal would have.²

The Department of the Interior has now taken the position that the statement prepared for the Eastern Powder River basin of Wyoming is a proper regional statement, so that no analysis of broader scope need be prepared. However, that statement does not deal with questions of more than limited dimensions. In particular, it does not deal with the impact which massive development of the Northern Great Plains coal fields will have on Virginia and the entire Appalachian region. In discussing alternatives to full-scale coal leasing in the Eastern Powder River Basin, that statement briefly considers coal mining in Appalachia but concludes that the effect of coal exports from the Eastern Powder River "should be slight" and that "[a]ll producing mines and mines now being developed both in Appalachia and in the Eastern Powder River Basin have a ready market for low-sulfur coal . . ." Final Environmental Impact Statement, Eastern Powder River Coal Basin of Wyoming, pp. I-805 to 805a. The difficulty with this comparison is that Appalachia is not competing only with Eastern Powder River coal. It is competing now or in the near future with all of the massive coal production forecast for the entire Northern Great Plains region. Limiting the analysis to only one sub-region fatally restricts the consideration and totally underestimates the impact on Appalachia that mine after mine, sub-region after sub-region, will have.

² There are over 12,000 direct mining jobs in Virginia alone, nearly all of them within the Cumberland Commission's area. Virginia Department of Labor and Industry Annual Report, 1974, p. 85.

If present trends continue in Appalachia, one study has concluded that the number of men employed in the mines will be nearly halved by 1980. Charles River Associates, Inc., *The Economic Impact of Public Policy on the Appalachian Coal Industry and the Regional Economy*, prepared for the Appalachian Regional Commission, Washington, D.C., 1978. The effect which that reduction in employment would have on this permanently depressed region need not be described.

Amici submit that the National Environmental Policy Act requires the Department of the Interior to weigh these relative regional impacts on large-scale federal coal development in the Northern Great Plains. The full effect of coal development in the Northern Great Plains on the eastern coal-producing states can only be adequately analyzed and fairly considered by a regional statement on the entire Northern Great Plains rather than only a portion of it. We submit that an adequate regional environmental statement is necessary to ensure consideration of these important social, economic, and environmental issues in the Department's decision-making process, and that such consideration is essential to enable the decision-maker to understand the true costs of the various alternatives.

II

THE COMPARATIVE ENVIRONMENTAL EFFECTS OF WESTERN AND EASTERN COAL PRODUCTION CAN BEST BE CONSIDERED IN A REGIONAL ENVIRONMENTAL IMPACT STATEMENT

Amici submit that a site-specific environmental impact statement, however thoroughly it may weigh the impact of a proposed action upon a specific area, is not sufficient if it does not consider the vitally important question whether the environmental effects of similar action elsewhere would be less damaging.

For example, environmental statements which the Department of the Interior has prepared on mining plans in the Northern Great Plains do not compare the effects of strip mining on lands, vegetation and wildlife in areas with little rainfall and poor soil with deep mining or with strip mining in areas where reclamation is substantially easier and more certain. It does not compare the effect of coal production in the west on that region's land and water with the environmental effects of coal production in the east. It does not compare the environmental effects and the costs in resources of moving coal or electricity long distances by rail, slurry pipeline or transmission line with the environmental effects and costs of transportation of coal or electricity from areas near the point of consumption. It does not compare the relative environmental effects on air quality of using coal, often without sulfur control technology, in regions of extremely clean air against the effects of using the best technology available with coal of the same or somewhat higher sulfur content. It does not consider the environmental effects of consuming large amounts of energy and possibly of water in order to move coal or electricity long distances.

The Department of the Interior mentions in its one-page analysis of western versus eastern coal production that (Coal Programmatic EIS, pp. 8-21 to 8-32):

Transportation systems and utilities are already constructed much more extensively in the East than in the West. As such, expansion of the eastern coal industry would not require the degree of pioneer construction (roads, railroads, pipelines, power) as needed elsewhere. In summary, eastern coal development would impact on less surface terrain than western coal since it will be predominantly underground mining.

The Department of the Interior's position that it is not required to prepare a comprehensive environmental impact statement on its decision to award scores of coal leases in the Northern Great Plains region effectively means that it will not be able to weigh the relative environmental and economic impacts which these brief comments acknowledge exist as to transportation systems and surface terrain in eastern and western coal mining areas. In a time of capital shortage and national railroad problems, we submit that no federal decision-maker can adequately weigh the costs and benefits of this coal-leasing program without a full consideration of these likely effects.

Amici submit that the National Environmental Policy Act requires that these issues be subjected to more than a mere comment. The relative environmental costs of strip and surface mining, the relative impacts on land, air and water resources, and the effects on energy supplies of long-distance transportation are issues which the Department of the Interior should consider carefully when it contemplates awarding scores of coal leases in a region where geological, hydrological, and climatic characteristics, and distances from potential markets may cause far greater environmental harm than would result from increased coal production in another region.

III

A REGIONAL ENVIRONMENTAL IMPACT STATEMENT IS NECESSARY TO ANALYZE THE RELATIVE COSTS OF EASTERN AND WESTERN COAL

None of the few environmental impact statements which have been prepared concerning federal activities in the Northern Great Plains have considered the question whether western coal, which is generally much lower in heat value than eastern coal, is actually cheaper or more expensive than eastern coal when delivered

to the midwestern and eastern markets traditionally served by eastern coal. Coal is more expensive to ship than any other fuel; transportation costs account for approximately 30 percent of the total delivered price. Greater Coal Utilization, Joint Hearings before the Senate Committees on Interior and Insular Affairs and Public Works, 94th Cong. 2d Sess., p. 268 (1975). In a society committed to energy conservation, the wastefulness of shipping western coal to eastern markets when local coal is readily available is at best questionable. See Telegram to the President from Senator Jennings Randolph of West Virginia reproduced in Greater Coal Utilization, *supra*, p. 1460.

The Department of the Interior states in the Coal Programmatic Statement that "Eastern bituminous coal * * * has a 35 percent greater heat value than western subbituminous coal." Coal Programmatic, p. 8-31. This is the extent of its analysis. There is no consideration of the effect of this considerable disparity in heat value upon the relative costs of eastern and western coal or on the relative costs of transporting equivalent quantities of coal in terms of heat value.

It cannot be assumed that western coal is being mined and shipped to the east and midwest because it is cheaper. The Northern Great Plains Resources Program Report (p. 32), which was recently issued by various federal agencies including the Department of the Interior, shows that strip-mined coal delivered by train from the Northern Great Plains to Chicago, New Orleans, Atlanta and other points farther east is more expensive than Appalachian coal delivered to those points from strip mines and even from underground mines. Moreover, vast quantities of coal, including low sulfur coal, are available in Appalachia, enough to supply all needs east of the Mississippi for many decades to come.

It thus appears that the heavy emphasis by industry on western coal may not be based on lower total costs for western coal, or lack of adequate reserves in the east, but rather on other factors such as the ease by which coal companies can obtain large blocks of stripable coal from the Federal government. It may also be based on the fact that a "fuel adjustment clause" in the tariffs of many utilities permits them to pass through all increased fuel costs, including transportation costs, to their consumers without necessitating a hearing before a state utility commission. See Facts About Coal in the United States, pp. 18-19, reprinted in Greater Coal Utilization, *supra*, pp. 247-248.

* * * *

These issues are plainly matters worthy of serious study. A fair analysis of the effects of western coal development on the economic, social, and environmental character of Appalachia, as well as of the Northern Great Plains, of the comparative environmental effects of coal production on Appalachia and the Northern Great Plains, of the comparative economic cost of coal delivered in the eastern half of the country, both in price per ton and in the effects it has on national investment, transportation, and job development plans, might well have a major impact on the decisions of the Secretary of the Interior.

On the one hand, as respondents' brief sets forth, massive coal development of the Northern Great Plains seriously threatens the environment of that region. On the other hand, massive development of the Northern Great Plains seriously threatens the economic and social well-being of Appalachia and therefore the human environment in which its population lives. Moreover, it is likely that western coal will be higher in price when delivered to eastern and middle western markets than low-sulfur Appalachian coal. A regional environmental

impact statement which adequately analyzed and presented these issues to the Secretary of the Interior might well persuade him, at the very least, to limit the scope of development in the west to a level which would reduce the harm both to Appalachia and to the Northern Great Plains.

CONCLUSION

For the foregoing reasons, the Commonwealth of Virginia and the Cumberland Plateau Planning District Commission urge the Court to affirm the decision of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

CUMBERLAND PLATEAU PLANNING
DISTRICT COMMISSION

RONALD J. WILSON

Attorney for the Commission
810 - 18th Street, N.W.
Washington, D.C. 20006

COMMONWEALTH OF VIRGINIA

ANDREW P. MILLER
Attorney General

ANTHONY F. TROY
Chief Deputy Attorney
General

JAMES E. RYAN, JR.
Deputy Attorney General

FREDERICK S. FISHER
Assistant Attorney General

J. THOMAS STEGER
Assistant Attorney General
Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219